No. 84-643

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF ARKANSAS — PETITIONER

VS.

RANDY LEWIS BAIRD
HENRY EDWARD HEIMEYER
and TERRY L. FORGY — RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

RESPONDENT TERRY FORGY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE WARRANTLESS SEIZURE OF FORTY-SEVEN PRESUMPTIVELY PROTECTED MAGAZINES WITHOUT ANY PRIOR JUDICIAL EXAMINATION INTO THE ISSUE OF OBSCENITY WAS AN UNCONSTITUTIONAL PRIOR RESTRAINT AND SEIZURE IN VIOLATION OF THE RESPONDENTS' RIGHTS GUARANTEED BY THE FIRST, FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

II.

WHETHER THE INVENTORY LIST OF THE TITLES OF FORTY-SEVEN PRESUMPTIVELY PROTECTED MAGAZINES SEIZED UNLAWFULLY DURING A WARRANTLESS SEARCH COULD CONSTITUTIONALLY BE ADMITTED AS DERIVING FROM AN INDEPENDENT SOURCE

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STATEMENT OF THE CASE

Respondents, Terry Forgy, Randy Baird and Henry Heimeyer were charged with violation of Ark. Stat. Ann. Section 41-3553 (Repl. 1977), which prohibits the sale and circulation of obscene periodicals. They were convicted in Texarkana Municipal Court and appealed to the Circuit Court of Miller County. After a trial *de novo* before a jury, they were again convicted. The Arkansas Court of Appeals affirmed the conviction of Forgy, and reversed the convictions of Baird and Heimeyer. From these reversals, the State petitioned this Court for a writ of certiorari.

On February 28, 1983, a Texarkana police major went to Respondent Forgy's bookstore to ostensibly check for an occupational tax permit. The major observed materials he believed to be obscene and returned to the police station where he ordered a police officer to purchase some of these materials. After filling out membership forms and paying a membership fee, the officer purchased two magazines.

At this point, police officers met with Texarkana prosecuting attorneys to discuss the proper means in which to arrest the Respondent and seize allegedly obscene materials. At the meeting it was decided that police officers would obtain an arrest warrant for the Respondent, and upon his arrest, seize a copy of each book and magazine that in the determination of the officers was obscene. At this meeting, the prosecutors and the police officers also determined that the seizure of these allegedly "obscene" books could be justified under the pretext of the "plain view doctrine." (See Appendix, pp. 22-25, 27, 36-37, 40-41).

Pursuant to this plan, the police officers obtained an arrest warrant for the Respondent Forgy issued by a local court clerk. At no point did a neutral and detached magistrate determine if probable cause existed for a determination of obscenity of the material in question or for the

Respondent's arrest. Without any search warrant, the officers proceeded to Respondent's bookstore and seized forty-seven books and magazines from the bookstore that they determined were obscene based solely upon the cover of those materials. (Appendix, p. 7). Many of these magazines were the only copy of that publication available for distribution from Respondent Forgy's establishment. (Appendix, p. 7) During the course of the seizure, the officers made an inventory of the items seized and arrested two of Respondent's Forgy's employees, Respondents Randy Baird and Henry Heimeyer.

All Respondents were charged with violations of Arkansas Stat. Ann., Section 41-3553 (Repl. 1977), which prohibits the sale and circulation of obscene periodicals. In the Circuit Court, the Respondents filed a motion to suppress all materials. This motion was denied. However, at trial, only a list of the titles of the forty-seven magazines seized were introduced into evidence. After Respondent Forgy's conviction in the trial, he brought an appeal to the Arkansas Court of Appeals on six issues. The Court of Appeals refused to consider four of these issues on the basis that Forgy's counsel at trial had failed to object timely during trial. (See p. A5 of Petition for Writ of Certiorari). These issues concerned: (1) the prior repeal of the statute under which Forgy was convicted; (2) the defective jury charge concerning the definition of obscenity; (3) the admission of the irrelevant and highly prejudicial list of titles of the forty-seven magazines seized; and (4) the prosecuting attorney's comments about the Respondent's decision not to testify during closing argument.

On the two issues remaining, the Court of Appeals held: (1) while the seizure of the list of forty-seven magazine titles was unconstitutional under the authority of *Roaden v. Kentucky*, 413 U.S. 497, 37 L.Ed.2d 757, 93 S.Ct. 2796 (1973), it was harmless error beyond a reasonable doubt with respect to Respondent Forgy; and (2) the trial court did not abuse its discretion in refusing to admit as

evidence of contemporary community standards another adult film playing in Texarkana, Arkansas.

The State of Arkansas has petitioned this Court for a writ of certiorari on the basis that: (1) the *warrantless seizure* of the forty-seven books on February 28, 1983 was *not* a violation of the First, Fourth and Fourteenth Amendments to the United States Constitution; and (2) the admission into evidence of the inventory list of the titles of the forty-seven magazines seized without a search warrant, was constitutional because this list *could* have been derived from an independent source.

The Respondent submits that these assertions are wholly contrary to the existing body of case law decided by this Court. In essence, the State of Arkansas is asking this Court to reverse many of its own decisions that form the basic foundation for two fundamental components of the Bill of Rights, the First and Fourth Amendments to the United States Constitution.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I.

THE WARRANTLESS SEIZURE OF FORTY-SEVEN PRESUMPTIVELY PROTECTED MAGAZINES BASED UPON THE POLICE OFFICERS' DETERMINATION OF OBSCENITY SOLELY FROM THE COVERS OF THE MAGAZINES WAS A GROSS VIOLATION OF THE RESPONDENTS' RIGHTS GUARANTEED BY THE FIRST, FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. *The Warrantless Seizure of Forty-Seven Magazines, Many of Which Were the Only Copy Available at the Bookstore, Was An Impermissible Prior Restraint in Violation of Respondent's First Amendment Rights*

Respondents were charged and convicted of violations of Ark. Stat. Ann. Section 41-3553 (Repl. Vol. 1977), prohibiting the sale of obscene materials. It is undisputed that obscenity is not speech protected by the First Amendment. *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, *reh. denied*, 414 U.S. 881 (1973). However, it is equally well established that all speech material is presumptively protected by the Constitution until a final judicial determination of obscenity is made. *Heller v. New York*, 413 U.S. 483, 37 L.Ed.2d 745, 93 S.Ct. 2789; *Roaden v. Kentucky*, 413 U.S. 496, 37 L.Ed.2d 757, 93 S.Ct. 2796 (1973). "[T]he First Amendment requires that procedures be incorporated that 'ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line.'" *Blount v. Rizzi*, 400 U.S. 410, 416, 91 S.Ct. 423, 428, 27 L.Ed.2d 498 (1971) *quoting Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). "[T]he line between speech unconditionally guaranteed and

speech which may be regulated, suppressed or punished is finely drawn. ... The separation of legitimate from illegitimate speech calls for ... sensitive tools ..." *Speiser v. Randall*, 357 U.S. 513, at 525, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958). As such, "Any system of prior restraint ... 'comes to this Court bearing a heavy presumption against its constitutional validity.'" *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 43 L.Ed.2d 448, 95 S.Ct. 1239 (1975) *quoting Bantam Books, Inc. v. Sullivan, supra*, 372 U.S. at 70.

In the instant case, the police officers not only failed to employ the required sensitive tools in suppressing presumptively protected speech materials, but, in fact, bludgeoned all significance from the guarantees embodied by the First Amendment. Here, the police engaged in the seizure of forty-seven magazines, without even attempting to procure a search warrant. The officers seized these magazines solely on the basis of their own determination of obscenity without consulting any neutral magistrate on that issue. In making this determination of obscenity, the police officers looked only at the cover of these magazines, without any examination of the magazines as a whole. Although only one copy of each magazine was seized, in many cases that was the sole copy of that magazine within Respondent Forgy's bookstore. As a result, the distribution of such magazines was, in fact, effectively stopped without any prior judicial determination of obscenity.

This Court in a consistent line of cases, has repeatedly and unequivocally rejected such sweeping and harsh treatment of all materials presumptively protected by the First Amendment. The Court in *Marcus v. Search Warrant*, 367 U.S. 717 (1961), held that a warrant for the seizure of allegedly obscene books could not be "issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene." 367 U.S. at 731-732. There, the Court stated:

> ... [T]here was *no step* in the procedure before seizure *designed to focus searchingly on the question of obscenity. ... [D]iscretion to seize allegedly obscene materials cannot be confided to law enforcement officials without greater safeguards than were here operative. Procedures which sweep so broadly and with so little discrimination are obviously deficient* in techniques required by the Due Process Clause of the Fourteenth Amendment to prevent erosion of constitutional guarantees. *Id.* at 732-733 (Footnotes omitted and emphasis added).

The Court went on to find that the illegal seizure in *Marcus* had imposed a prior restraint upon material presumptively protected by the First Amendment:

> But there is no doubt that an effective restraint—indeed the most effective restraint possible—was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor. ... Their ability to circulate their publications was left to the chance of securing other copies, themselves subject to mass seizure under other such warrants. The public's opportunity to obtain the publications was thus determined by the distributor's readiness, and ability to outwit the police by obtaining and selling other copies before they in turn could be seized. In addition to its unseemliness, we do not believe that this kind of enforced competition affords a reasonable likelihood that nonobscene publications, entitled to constitutional protection, will reach the public. A distributor may have every reason to believe that a publication is constitutionally protected and will be so held after judicial hearing, but his belief is unavailing as against the contrary judgment of the police officer who seized it from him.

(Footnotes omitted and emphasis added). 367 U.S. at 736-737.

See also A Quantity of Books v. Kansas, 378 U.S. 205, 12 L.Ed.2d 809, 84 S.Ct. 1723 (1964).

Lee Art Theater v. Virginia, 392 U.S. 636, 20 L.Ed 2d 1313, 88 S.Ct. 2103 (1968) invalidated the seizure of a film from a commercial theatre regularly open to the public. Following *Marcus*, the Court stated:

> *'[t]he procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure "designed to focus searchingly on the question of obscenity," Id. [Marcus v. Search Warrant,, supra]* at 732, 6 L.Ed.2d 1127, and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression.' *Lee Art Theatre v. Virginia*, 392 U.S. at 637. (Emphasis added).

The reasoning in these decisions reached its culmination in *Roaden v. Kentucky*, 413 U.S. 496, 37 L.Ed.2d 757, 93 S.Ct. 2796 (1973). The facts in *Roaden*, strikingly similar to the case at bar, involved the seizure of a film by a local sheriff, based upon alleged obscenity, after he had observed the film in its entirety. It was undisputed:

> (a) that the sheriff had no warrant when he made the arrest and seizure, (b) that there had been no prior determination by a judicial officer on the question of obscenity, and (c) that the arrest was based solely on the sheriff's observing the exhibition of the film. *Roaden v. Kentucky*, 413 U.S. at 498-499.

The defendant moved to suppress the film, which motion was denied. At trial, a jury convicted the defendant of

exhibiting an obscene film. The Supreme Court unanimously reversed the conviction.

In holding that the film must be suppressed, Chief Justice Burger in writing for the majority, began the analysis by stating:

> The seizure of instruments of a crime, such as a pistol or a knife, or 'contraband or stolen goods or objects dangerous in themselves,' (citation omitted), *are to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth or Fourteenth Amendment standards. Roaden v. Kentucky, supra,* at 502. (Emphasis added).

After a discussion of *Marcus, A Quantity of Books* and *Lee Art Theatre* in relation to this principle the Court stated:

> The common thread of *Marcus, A Quantity of Books* and *Lee Art Theatre* is to be found in the nature of the materials seized and the setting in which they were taken. *See Stanford v. Texas*, 379 U.S. 476, 486, 13 L.Ed.2d 431, 85 S.Ct. 506 (1975). *In each case the material seized fell arguably within First Amendment protection, and the taking brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition.* Seizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a bookstore. *Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable*, not simply because it would have been easy to secure a warrant, but rather *because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle*

in the evaluation of reasonableness. The setting of the bookstore or the commercial theater, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is 'unreasonable' in the light of the values of freedom of expression. As we stated in *Stanford v. Texas, supra:*

> 'In short ... *the constitutional requirement that warrants must particularly describe* the "things to be seized" is to be accorded the *most scrupulous exactitude when the "things" are books, and the basis for their seizure is the ideas which they contain. See Marcus v. Search Warrant*, 367 U.S. 717, 6 L.Ed.2d 1127, 81 S.Ct. 1708; *A Quantity of Books v. Kansas*, 378 U.S. 205, 12 L.Ed.2d 809, 84 S.Ct. 1723. *No less a standard could be faithful to First Amendment freedoms.* The constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case.' 379 U.S. at 485, 13 L.Ed.2d 431. (Footnotes omitted and emphasis added).

Against this backdrop this Court concluded in no uncertain terms that:

> If, as *Marcus* and *Lee Art Theatre* held, a warrant for seizing allegedly obscene material may not issue on the mere conclusory allegations of an officer, *a fortiori, The officer may not make such a seizure with no warrant at all. Roaden v. Kentucky, supra,* at 506. (Emphasis added).

The vitality of the *Roaden* decision has remained intact. In *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) the United States Supreme Court in Justice White's majority opinion reiterated these principles:

> Where presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field. Similarly, where seizure is sought of allegedly obscene materials, the judgment of the arresting officer alone is insufficient to justify issuance of a search warrant or a seizure without a warrant incident to arrest. The procedure for determining probable cause must afford an opportunity for the judicial officer to 'focus searchingly on the question of obscenity.' (Citations omitted).

More recently, the Court unanimously rejected the seizure of allegedly obscene materials pursuant to an open-ended search warrant in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 60 L.Ed.2d 920, 99 S.Ct. 2319 (1979).

These consistent, unequivocal statements indicate that the questions presented in the Petition for Certiorari have been resolved by this Court many times over. Moreover, *Marcus* and *Roaden* explicitly state the minimum constitutional requirements for such a seizure of presumptively protected material which include a determination of probable cause by a neutral magistrate *prior* to seizure, followed by a prompt post-seizure judicial determination of the obscenity issue.

None of these procedures were followed in this case. The police officers never attempted to obtain a search warrant. No determination of probable cause was ever made by any neutral magistrate. Instead, the officers relied only on their own unfettered discretion in determining which magazines were obscene. The Petitioner attempts to justify this complete disregard of the required procedures by asserting that the police officers used "fairly objective standards" in the determination of obscenity. However, *Marcus* explicitly required far more than just "fairly objective standards" employed by police officers in

requiring a neutral magistrate to focus "searchingly on the issue of obscenity."

In addition, precisely the same type of prior restraint exists in the instant case as in *Roaden*. While Petitioner takes pains to point out that only one copy of each magazine was seized, it neglects to state that, in many cases, the single copy seized was, in fact, the only copy in Respondent's bookstore. Thus, contrary to Petitioner's assertions, the seizure, in fact, "brought to an abrupt halt [the] orderly and presumptively legitimate distribution or exhibition" of many magazines sold at Respondent's establishment. *Roaden*, 413 U.S. at 504.

However, the constitutional violations did not end there. The police officers did not even attempt to comply with the well established three part test for obscenity enunciated by this Court in *Miller v. California*, 413 U.S. 16, at 431 (1973). This test is:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *Miller v. California*, 413 U.S. at 431. (Citations omitted).

Here, the police officers seized all materials from the bookstore that appeared to be sexually explicit solely on the basis of the cover of the magazine. Absolutely no effort was made by the officers to examine these presumptively protected materials "as a whole" making it impossible for the police to make a proper determination of the obscenity of these magazines. Even the sheriff in *Roaden* viewed the entire film before he made the warrantless seizure that

was rejected by this Court.

It is almost inconceivable how Petitioner can honestly argue that the seizure of presumptively protected speech materials in the instant case was reasonable. This Court has repeatedly and unequivocally enunciated the controlling principles of such seizures. Here, the police officers completely failed to apply these "sensitive tools" required by this Court in seizing these magazines and instead, created their own procedures which they applied to the Respondent with the sublety of a sledgehammer. As such, this seizure presents an even more egregious factual situation than that rejected by this Court unanimously in *Roaden v. Kentucky*. Petitioner is requesting this Court, in essence, to set aside almost the entire body of First Amendment law that has been so carefully crafted by this Court for decades. For these reasons, the Petition for Certiorari should be denied.

B. *The Warrantless Seizure of Forty-Seven Magazines Was an Unreasonable Seizure in Violation of the Fourth Amendment to the United States Contitution*

The requirements of the Fourth Amendment must be applied with "the most scrupulous exactitude" where the items sought to be seized are presumptively protected by the First Amendment. *Stanford v. Texas, supra; Roaden v. Kentucky, supra*. Thus, even if the warrantless seizure of magazines from Respondent's bookstore was not a prior restraint in violation of the First Amendment, it would still constitute an unreasonable search in violation of the Fourth Amendment.

> The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that '*searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment*—subject only to a few specifically established and

well-delineated exceptions.' *Katz v. United States*, 389 U.S. 347, 357 (1968); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (Footnotes omitted and emphasis added).

Petitioner attempts to justify the seizure by asserting that the magazines were in plain view. However, there are two significant limitations to the "plain view" doctrine. The first of these is:

> ... that plain view *alone* is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle ... that no amount of probable cause can justify a warrantless search absent 'exigent circumstances' ... [E]ven where the object is contraband, this Court has repeatedly stated and enforced the basic rule that police may not enter and make a warrantless seizure. (Citations omitted). *Coolidge v. New Hampshire*, 403 U.S. 443, at 468, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971) *reh. denied* 404 U.S. 874.

Petitioner argues that exigent circumstances existed here since due to the proximity of Respondent's bookstore to the state line, evidence could be destroyed "by simply walking across the street." Petitioner's Argument, p. 5. Petitioner contends, in essence, that the Fourth Amendment simply does not apply to businesses or residences that are located within sixty feet of the state line. This argument is patently absurb.

Moreover, this Court has frequently stated that "a warrantless search must be strictly circumscribed by the exigencies which justify its initiation." *Mincey v. Arizona*, 437 U.S. 385, at 393, 37 L.Ed.2d 290, 98 S.Ct. 2708 (1978) *quoting Terry v. Ohio*, 392 U.S. 1, 25-26, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). Here, no exigency ever existed to initiate this warrantless search. The manufactured justification

for the warrantless search presented by Petitioner, after the fact, cannot validate this warrantless seizure that was unreasonable from its outset. Moreover, this argument is not supported by the facts since an officer who participated in the seizure testified during the suppression hearing that he never considered the possibility that evidence would be destroyed by crossing the state line. (Appendix, p. 15).

The second limitation on the "plain view" doctrine is that the discovery of evidence in plain view must be inadvertent.

> But, *where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatsoever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se unreasonable* in the absence of 'exigent circumstances.' *Coolidge v. New Hampshire, supra,* at 470. (Emphasis added).

The seizure in the instant case cannot in any way be characterized as inadvertent. Here, police officers met with Texarkana prosecutors prior to the seizure to plan the seizure of items from Respondent's bookstore. Moreover, there can be no question that the officers were aware they would find the seized magazines at the bookstore. (Appendix, pp. 7-8).

Petitioner also apparently tries to justify the seizure as incident to a lawful arrest since the officers had obtained a warrant for the arrest of Respondent Forgy. However, in cases involving presumptively protected speech materials, probable cause for an arrest cannot exist without a prior judicial determination of obscenity. The determination of probable cause for arrest in such cases cannot be left to

the discretion of a police officer. "*[T]he judgment of an arresting officer alone is insufficient to justify* issuance of a search warrant or *a seizure without a warrant incident to arrest*," where seizure is sought of presumptively protected materials. *Zurcher v. Stanford Daily, supra*, at 564. (Emphasis added). Moreover, the seizure of forty-seven magazines cannot be justified under *Chimel v. California*, 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034 (1969) since there was no imminent threat to the police officers' safety and no indication that any Respondent intended to destroy evidence.

Petitioner also suggests that Respondent Forgy had no legitimate expectation of privacy against government intrusion since his bookstore was open to the public. However, this argument was rejected in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 60 L.Ed.2d 920, 99 S.Ct. 2379 (1979). There the Chief Justice, in writing for a unanimous Court, stated:

> The suggestion is that by virtue of its display of the items at issue to the general public in areas of its store open to them, petitioner had no legitimate expectation of privacy against governmental intrusion, and that accordingly no warrant was needed. But there is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees. (Citations omitted) *Lo-Ji Sales, Inc. v. New York*, 442 U.S. at 329.

As seen, every reason Petitioner has advanced to justify this warrantless seizure of presumptively protected speech materials is without merit under established Fourth Amendment principles. Thus, not only did this warrantless seizure make a mockery of First Amendment protections, but it also clearly violated the Fourth Amendment. Therefore, the Arkansas Court of Appeals correctly held the

warrantless seizure of magazines from Respondent's bookstore was unconstitutional.

II.

THE INVENTORY LIST OF THE TITLES OF FORTY-SEVEN MAGAZINES UNLAWFULLY SEIZED IS NOT ADMISSIBLE SINCE THE PETITIONER HAS FAILED TO MAKE ANY SHOWING THAT THE LIST WAS OBTAINED FROM AN INDEPENDENT SOURCE

Petitioner contends that the inventory list of the titles of the forty-seven magazines seized without a warrant should not be excluded from evidence. As authority for this contention, Petitioner cites *Nix v. Williams*, _____ U.S. _____, 81 L.Ed.2d 377, 104 S.Ct. _____ (1984); and *Segura v. United States*, _____ U.S. _____, 82 L.Ed.2d 599, 104 S.Ct. 3380 (1984) which enunciated, respectively, the related concepts of "inevitable discovery" and "independent source" in connection with the exclusionary rule. Ignoring the fact that the relevance of the list of magazine titles to these obscenity prosecutions is highly questionable, Petitioner's reliance on these cases is misplaced.

In both of these cases, this Court had a solid foundation of facts upon which to make the determination that certain evidence could be admitted. Here, however, Petitioner is asking to admit into evidence a list of titles based solely on the basis of speculation concerning what *might* have been.

Segura v. United States, *supra*, enunciated the independent source exception to the exclusionary rule. It must be noted that the Court stated at the outset of the opinion that "Our disposition of both questions is carefully limited," 82 L.Ed.2d at 604. *Segura* held that evidence seized pursuant to a valid search warrant was not tainted by an

earlier illegal entry into the property. The factual situation underlying this decision was well established:

> None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant. *It is therefore beyond dispute that the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evidence now challenged.* This evidence was discovered the day following the entry, during the search conducted under a valid warrant; it was the product of that search, wholly unrelated to the prior entry. The valid warrant search was a *'means sufficiently distinguishable'* to purge the evidence of any 'taint' arising from the entry. *Wong Sun*, 371 U.S. at 488, 9 L.Ed.2d 441, 83 S.Ct. 407. Had police never entered the apartment, but instead conducted a perimeter stakeout to prevent anyone from entering the apartment and destroying evidence, the contraband now challenged would have been discovered and seized precisely as it was here. (Footnotes omitted and ~~e~~mphasis added). *Segura v. United States, supra*, 82 L.Ed.2d at 614-615.

Thus, in *Segura*, a discrete division existed between the unlawful police activities and the evidence seized pursuant to a valid search warrant.

The inevitable discovery rule set forth in *Nix v. Williams* also required a definite showing by the government:

> Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. However, *if the government can prove* that the evidence *would* have been obtained inevitably and, therefore, *would* have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. [Emphasis added]. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a *worse* position that it would have occupied without any police misconduct. [Emphasis by Court]. *Nix v. Williams*, 81 L.Ed.2d at 389-390.

Under this test, the government was required to *prove* that the body of the murder victim *would* have been inevitably discovered. In *Nix* the government met its burden of proof by producing substantial evidence that was extensively discussed by the Court.

In stark contrast to *Nix* and *Segura*, Petitioner in the instant case advances only speculation and sophistry to support its argument. Here, the inventory list of titles is not only connected to a blatantly illegal search, it is, in fact, a manifestation of that unconstitutional conduct. Absolutely no discrete division exists between the unlawful police conduct and the evidence sought to be admitted. There exists no "means sufficiently distinguishable" to purge the list of titles of any taint arising from the warrantless search. *Segura*, 82 L.Ed.2d at 615.

Petitioner has advanced no concrete evidence that the list of titles *would* inevitably have been obtained without any illegality. Throughout its argument, Petitioner argues that the list of titles *could* have been obtained lawfully.

Petitioner advances no evidence that indicates that it has actually obtained a list of book titles at any time, and ever used a list of titles to prosecute any individual for promoting obscenity. As a result, this argument must fall since it is based on nothing more than speculation about how the police officers, in theory, *could* have acted.

Moreover, the use of such speculation significantly damages the fairness rationale underlying the inevitable discovery test as articulated in *Nix*. If the Court were to adopt the position advanced by Petitioner, this fairness analysis would become meaningless since the government could obtain evidence illegally and justify it by creating a purely hypothetical situation where the government *could* inevitably discover the evidence lawfully. That is exactly what Petitioner seeks to do here.

Therefore, the adoption of Petitioner's argument in the instant case would destroy the sharp distinctions that are made clear in the *Segura* and *Nix* opinions. Moreover, since Petitioner cannot produce any evidence other than hypotheticals of what the police could have done, the argument must fall. Indeed, Petitioner asserts that the list of titles could have been used in obtaining a search warrant. However, it is clear from *Marcus*, *Roaden*, and the other cases discussed *supra*, this list of titles alone would not be sufficient to support a finding of probable cause for a search warrant for any single magazine on the list. Petitioner's argument is, thus, anamolous since it seeks to have admitted into evidence of the substantive offense, a list of titles that could not even support a showing of probable cause. Based on the arguments presented by Petitioners on this issue, no significant reason exists for this Court to grant the Petition for Certiorari.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on a writ of certiorari "will be granted only when there are special and important reasons" for review. No special and important reason exists in the instant case.

An unbroken line of cases from *Marcus* to *Roaden* and beyond, clearly indicates that the procedures employed by the police officers in dealing with presumptively protected speech material in this case were constitutionally deficient. Based on these decisions, there is little question that the Arkansas Court of Appeals correctly held that the seizure of the forty-seven magazines was unconstitutional. Moreover, *Segura* and *Nix* present vastly different factual situations from the instant case that justify the limited independent source and inevitable discovery exceptions to the exclusionary rule. In the instant case, Petitioner relies solely on speculation to make *Segura* and *Nix* even arguably applicable.

Therefore, Respondent Terry Forgy, respectfully requests that this Honorable Court deny the State of Arkansas' Petition for Certiorari and grant any other relief it deems fit to correct the gross constitutional violations that occurred in this case.

Respectfully submitted,

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MOTION TO SUPPRESS, JUNE 3, 1983

SGT. BILL MOORE,

called as a witness in behalf of the defendants, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LEE:

Q Please state your name.
A Sgt. Bill Moore.
Q Mr. Moore, on or about 4-13-83 were you working for the Texarkana, Arkansas Police Department?
A Yes, sir. I was.
Q Did you have occasion on that day to go to a place known as State Line Books?
A Yes, sir.
Q Could you tell the Court approximately what time you arrived at those premises?
A It must have been four o'clock in the afternoon. I'm guessing from the time on my inventory sheet says 5:05; approximately an hour before that.
Q So, your answer is approximately an hour before the time on your inventory sheets?
A Just an approximate guess; I don't know exactly what time I checked out.
Q Officer, do you recall what happened when you first walked into the premises?
A Major Cowart was in the lead. I was behind—I think I was behind him; I'm not sure. Capt. Zane Gray, Lt. Allen Hartshorn and Officer Billy Jones were also with us, and I think I was behind Cowart; I can't remember.
Q At that particular time, do you know whether or not either of the officers were in possession of a search warrant?

A I wasn't in possession of a search warrant, and I don't believe anybody else was.
Q What was your purpose for going to the book store?
A To serve an arrest warrant on Terry L. Forgy.
Q Was it at any particular time prior to the seizure of the materials explained to you and Mr. Forgy was not at the store?
A No.
Q Do you recall whether it was explained to any of the other officers?
A To my knowledge, no; I don't know.
Q Presumably, Officer Moore, at some particular instance you looked for Mr. Forgy, is that correct?
A Uh-huh.
Q He was not there, is that correct?
A He was not.
Q Do you recall where you looked for him?
A Spoke to Mr. Baird, who was behind the counter.
Q So, it is not your contention, then, that upon entering the store there was any reason to believe that Mr. Forgy was hiding on the premises?
A I wouldn't have known Mr. Forgy if he had come up and punched me in the nose until I saw him later. I had never laid eyes on the man.
Q Now, think carefully, Mr. Moore. Prior to entering the store, anytime prior to entering the store, was the discussion of seizing materials on the rack ever conducted in your presence?
A Yes.
Q By whom?
A Major Cowart, myself; I don't know if Sgt. Adcock was present then or not.
Q When did this discussion take place?
A We were trying to figure out the correct procedure on making the arrest and seizing any material that under the statute appeared obscene. We went to Mr. McDaniel's office and consulted him and Kirk Johnson both. Mr. McDaniel called somebody. If you want me to

assume, I will.

Q No, I'm not asking you to assume something.

A Okay, he make a telephone call and obtained some legal advice.

Q Mr. McDaniel is the deputy prosecutor for Miller County, is that correct?

A Right.

Q To your knowledge, no judge was ever consulted with regard to these matters prior to the seizure, is that correct?

A Prior to the seizure?

Q Yes, sir.

A We went to contact Judge Purifoy, and he directed us to Mr. McDaniel and Kirk Johnson.

Q Did you, or did any of the other officers, ask Judge Purifoy for a search warrant?

A Oh, Lord. We were wanting to know what the legalities were, whether we did need a search warrant if the material was on the racks. That's what we were trying to find out, what we needed.

Q But you never asked for a search warrant?

A Right off the top of my head I can't remember.

Q Was there any reason for you not asking for a search warrant?

A If the material was in plain view, that's one reason.

Q If the material was in plain view, that's one reason?

A Right.

Q But this was prior to you going into the store, is that correct?

A Uh-huh.

[Objection to leading question sustained]

Q (By Mr. Lee) Officer, how long have you been on the Texarkana, Arkansas Police Department?

A A little over six years now.

Q Have you been involved in the seizing of materials with a search warrant?

A Yes, I have.
Q You know the procedures for obtaining a search warrant?
A Yes, I do.
Q Do you feel that those procedures are overburdensome?
A In some instances, yes.
Q In some instances?
A Uh-huh.
Q Officer, based on the facts as you knew them to be on the day of the seizure, did you feel that there was any reason why there could not be a search warrant obtained for those premises?
A Well, I'm a law enforcement officer. I'm not a lawyer. I consulted two lawyers that day. Now, you tell me.
Q So, it's your statement that two lawyers informed you that you didn't need a search warrant?
A Yes, that's right.
Q So, that determination was made by the two lawyers and the police officers that were involved?
A By the two lawyers involved.
Q By the two lawyers involved?
A Right.

* * * *

CROSS EXAMINATION

BY MR. HUDSON:

Q Sgt. Moore, did you make inquiry of Assistant Prosecutor McDaniels and Prosecuting Attorney Kirk Johnson as to the proper way to make an arrest of Mr. Forgy in this case?
A Yes, sir, I did.
Q You had been informed before the arrest was made that there were alleged pornographic materials in the store, is that co-rect (sic)?
A Yes.
Q What other steps did you take to assure that you were making a legal arrest of Mr. Forgy that day?
A I went to the city collector's office and obtained Mr. Forgy's name from the occupational tax form that he filled out when you pay the occupational tax.
Q Did he have any address on that form other than the adult book store address?
A No, sir, he does not.
Q At that time, did you know of any place to find Mr. Forgy other than at the adult book store?
A No, sir.

[Objection overruled]

Q (By Mr. Hudson) Do you normally just ask the first person that answers the door whether the suspect is there, and if they say no, you go on your way looking some place else?
A No, sure don't.
Q When Mr. Baird told you that Mr. Forgy was not there, did you feel obliged to take his word for that?
A No, I didn't.
Q Was there any reason for going past this so-called second door other than to look for Mr. Forgy?
A None.

Q When you passed the second door, what was the first thing you saw, or, if you could, describe the room that you saw there.

A When you clear the second door, the rooms open up. As you walk in the door, in front of you and kind of to the right against the wall there is a case, and then, on the wall that you are looking at, there is racks of magazines. Then, to your left, just kind of around and to the left there is another counter there of which Mr. Baird was behind.

Q Was Mr. Heimeyer there at that time?

A No, I believe he came in a short time after that.

Q Could you see what was on the cover of these magazines when you walked into the second room, or into the room?

A When you cleared the second door and I got up closer, yes, I could.

Q Armed with the definitions of the instructions that you had from the prosecutors, did you make a determination as to whether these magazines were obscene under the Arkansas Statutes?

A The way I had it explained to me, yes, I did.

[Magazines marked for identification as Exhibit 1 over Defense Counsel's objection and identified by the witness]

* * * *

Q As I understand it, you saw these and made a determination that in your judgment they were in violation of the obscenity statute from the cover of each of these magazines?

A Yes, sir.

Q Did you compile a list of these?

A Yes, sir, I did.

[Exhibit 2, the inventory list of magazine titles is identified. Exhibits 1 and 2 admitted over defense counsel's

objection. See pp. A29-A31 of Petition for Writ of Certiorari Exhibit 3, Arrest Warrant for Terry Forgy admitted into evidence]

Q Did you all leave anything in the store when you left after the arrest?
A Yes, sir.
Q What items did you have?
A My orders were to seize one copy of any magazine that showed explicit sex acts on the front cover. We did that, and Mr. Baird even stood there and he assisted me to make sure that I did not get two of each.
Q Do you remember whether you took the last one of any of their stock of magazines?
A I believe that there were some copies that there was only one in the rack.
Q Did you take any films or any video tapes or anything like that?
A No, sir. I did not.
Q Did you take any of their so-called novelty items?
A No, sir.
Q What was the criteria you used to determine whether these magazines were obscene or not under the Arkansas statute?
A The way I was briefed was if the magazine showed any explicit sex acts on the cover; that strictly nudity was not considered obscene, that it had to show penetration and explicit sex acts, and/or.

MR. HUDSON: Pass the witness.

REDIRECT EXAMINATION

BY MR. LEE:

[Objection to leading question sustained]

Q (By Mr. Lee) Officer Moore, you stated upon cross examination by Mr. Hudson that you were briefed to take any magazines that showed explicit sex acts from the shelves, is that correct?
A Okay, explicit sex acts, yes, but rather than clean all the material out, we were to take one copy of each. That's the continuation of that statement; I'm sorry.
Q So, you, at the particular point you were standing inside the store, and I assume the other officers were also so briefed; they were all functioning with similar definitions?
A Right.

[The objections to leading questions sustained]

Q (By Mr. Lee) Officer Moore, how long did it take you to determine which magazines you were going to take?
A As far as determining the magazines to be taken, it wasn't that long. The longest part was the inventory.
Q The longest part was the inventory?
A Right.
Q Was there any discussion between the officers that were in the book store as to which magazines to take?
A I think, I don't know whether it was Captain Gray or Lt. Hartshorn, they picked up a couple of magazines and if they were showing naked torsos, bodies, and by what I had been told and the orders I was getting that wasn't considered obscene and they were put back on the rack.
Q Are you aware that the same statute that you were functioning under also covered items other than the ones that were taken?
A No, sir, I did not know it.

I believe Major Cowart walked to behind the counter, looked behind the counter. There is another room in the place. I don't know if anybody went in there and looked or not then. There is a door inside the second door; there is another door that goes to the right.

Q Did you go into the room?

A No, I didn't; sure didn't.

Q Was that b ecause [sic] you believed Mr. Baird when he said Mr. Forgy wasn't there?

A Well, I'll tell you what: The thing about it then, I wasn't doing the talking. Major Cowart was doing the talking. He was the officer in charge of the raid, the arrest, okay? Raid, arrest, whatever you would like to phrase it as.

Q But, if your purpose was to arrest Mr. Forgy, my question to you is once you entered the store did you go behond [sic] Mr. Baird's statement in looking for Mr. Forgy on the premises?

[Objection overruled]

A I did not. I was standing there waiting to see what the events were, okay? I was just kind of standing in the center of the room there, and I was looking at him and Major Cowart talking.

Q (By Mr. Lee) At some particular point, apparently the officers inside the place, including yourself, were satisfied that Mr. Forgy wasn't there. Is that a correct statement of the events?

A I would imagine, yes.

[Objection to leading question sustained]

Q (By Mr. Lee) Officer Moore, did you go there with the twofold purpose of arresting Mr. Forgy and seizing materials, or did you go there strictly to arrest Mr. Forgy?

A We went there to arrest Mr. Forgy, and if there was any

material the caliber of what Sgt. Adcock had purchased and it was in plain view, yes, sir, we were going to get it, that's right.

MR. LEE: No further questions, Your Honor. Pass the witness.

Q Have you ever conducted a search similar to this before?
A You mean of obscene material?
Q Yes, sir.
A No.
Q This is the first time you had ever been called on to interpret that statute?
A Yes, it is.
Q What is the geographical location of that book store in relationship to the city court house?
A To the city court house?
Q Yes, sir.
A You mean how many blocks?
Q Yes, sir.
A Four blocks; three and a half, I guess; up one over two and then up about a half, maybe a block.
Q Do you know whether or not the city judge was ever available during the day of the 13th?
A I don't know whether he was in his office.
Q Did you check?
A No, sir, I didn't.
Q Did any of your fellow officers check?
A I wouldn't know.

[Objection to leading question sustained]

Q (By Mr. Lee) You stated that you obtained the warrant of arrest for Mr. Forgy on cross examination?
A Yes, I did.
Q Officer Moore, could you tell the Court, other than this nebulous plain-view doctrine, could you tell the Court any reason why prior to going in the store you didn't try to obtain a search warrant?
A As I have stated, I was going by the information given me by, I would assume, they are two of the chief advisors of the county, the prosecuting attorney and the deputy prosecuting attorney. That's what information I was operating on and the reason we came over to the

county building was to try to figure out how to go down there, make the arrest, and what course of action we should take concerning the materials that were in the store.

[Objection to leading question sustained]

Q (By Mr. Lee) Did you know prior to going that you were going to seize some materials?
A From the two magazines that Sgt. Adcock bought, if those two were sitting in there, yes, sir, we were going to get those two.
Q So, you had time ...
A Right.
Q ... to get a search warrant?
A Right. We spent what, an hour? I don't know; I don't know how long we were over here.
Q You had Sgt. Adcock's testimony to support a search warrant?
A Yes, uh-huh.
Q Were you told directly by the two individuals that you stated advised you that you didn't need a search warrant?
A As far as the discussion we might possibly have, I can't honestly remember. I wish I had had a body mike on so you would have either heard the conversation ...
Q I understand. I understand your consternation, Officer. I realize it has been some time. Your statement is you can't remember whether or not you were told you didn't need it?

MR. HUDSON: Objection to leading, Your Honor.

THE COURT: Sustained.

Q (By Mr. Lee) Officer Moore, prior to going through the second door, did you believe Terry Forgy to be inside the store?
A Yes.
Q Once you got through the second door, did you look for him?
A Did we look for him? After Mr. Baird identified himself.

RECROSS EXAMINATION

BY MR. HUDSON:

Q Sgt. Moore, how far is the State Line Book Store, or the adult book store that we are talking about here from the state line between Texas and Arkansas?
A From the center line of the street, fifty foot, sixty foot; I don't know.
Q If the materials in that book store that you seized had been moved that fifty or a hundred feet, whatever it is, would you have been able to make an arrest?
A You mean if it crossed the center line of the street?
Q Yes.
A No.
Q When you and the other officers went past the second door and into the display room, were you still looking for Mr. Forgy at that point?
A When we what, now?
Q When you went past the second door into the room where the racks were, were you still looking for Mr. Forgy at that point?
A Yes.
Q By the time you had made the determination that Mr. Forgy was not there, had you already seen some of these magazines that have been marked Exhibit 1?
A Yes, sir.

MR. HUDSON: Pass the witness.

REDIRECT EXAMINATION

BY MR. LEE:

Q Officer Moore, when was it Officer Adcock came back to the police office with a magazine?

[Objection overruled]

A Would you repeat it, please?

[Mr. Lee]

Q Yes, sir. What time was it that Officer Adcock came back to the police department with the two magazines that he had purchased?
A Let'see, I was working two to ten, so it was sometime, I guess, after 1:30; I'm not sure.
Q Who was the other attorney you talked to other than the deputy prosecutor?
A Who was the other attorney?
Q Yes, sir.
A Kirk Johnson, the prosecuting attorney.
Q The prosecutor and the deputy prosecutor?
A Yes.
Q At what time did you discuss these matters with him?
A Sometime after that; sometime, you know, after Sgt. Adcock had came back.
Q Could you give me an estimate as to the time span?
A I don't know. I can't remember when Sgt. Adcock came back, and prior to going down to the book store.
Q Do you remember about how long your conversations with Mr. Johnson and Mr. McDaniel were?
A No, sir, I don't; I don't remember.
Q Was it thirty minutes or less?
A I guess it was longer than thirty minutes; seems like it was.
Q How long after your discussions with them was it before you got back to State Line Books?

A That I don't know either; I can't remember.
Q Did it ever cross your mind during these particular transactions that those books may have been moved across the state line?
A No, sir.
Q Was that ever a concern of yours?
A No, I didn't really think about it, no.

MR. LEE: No further questions of this witness.

RECROSS EXAMINATION

BY MR. HUDSON

Q Do you know whether that was a consideration of Major Cowart or not?

A I have no way of knowing.

MR. HUDSON: I have nothing further.

MR. LEE: I have nothing further.

THE COURT: Thank you. You may step down.